Petition

81-1692

Office - Supreme Court, U.S.
FILED
MAR 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-_____

* * *

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1981

* * *

W.J. ESTELLE, JR.,
Petitioner

V.

WALTER VON BURLESON,
Respondent

* * *

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

* * *

PETITION FOR WRIT OF CERTIORARI

* * *

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

DOUGLAS M. BECKER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys For Petitioner

QUESTION PRESENTED FOR REVIEW

Is the principle announced in *Crist v. Bretz*, 437 U.S. 28 (1978) — that the federal rule that jeopardy attaches when the jury is impaneled and sworn is an integral part of the Fifth Amendment guarantee against double jeopardy and applies to the states through the Fourteenth Amendment — retroactive?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 4

REASONS WHY THE WRIT SHOULD BE GRANTED 5

CONCLUSION 13

INDEX OF AUTHORITIES

Cases	Page
Anderson v. State, 7 S.W. 40 (Tex.Crim.App. 1886)	7
Benton v. Maryland, 395 U.S. 784 (1978)	6,7
Brown v. Louisiana, 447 U.S. 323 (1979)	11
Burks v. United States, 437 U.S. 1 (1978)	5
Crist v. Bretz, 437 U.S. 28 (1978)	passim
Downum v. United States, 372 U.S. 734 (1963)	7
Estelle v. Gamble, 429 U.S. 97 (1976)	9
Greene v. Massey, 437 U.S. 19 (1978)	5
Illinois v. Sommerville, 410 U.S. 458 (1973)	8
Jackson v. Justices of the Superior Court of Massachusetts, 549 F.2d 215 (1st Cir.), *cert. denied*, 430 U.S. 975 (1979)	12
Linkletter v. Walker, 381 U.S. 618 (1965)	4,6
Lockridge v. State, 522 S.W.2d 526 (Tex.Crim.App. 1975)	7
Mays v. State, 101 S.W. 207 (Tex.Crim.App. 1907)	7
Ochoa v. State, 492 S.W.2d 276 (Tex.Crim.App. 1973)	7

People v. Green, 74 Ill.App.2d 308, 218 N.E.2d 840 (1966), *cert. denied*, 387 U.S. 930 (1967) 8

People v. Grevan, 23 Ill.App.3d 997, 320 N.E.2d 476 (App.Ct. 1974) 8

Ramirez v. State, 352 S.W.2d 131 (Tex.Crim.App. 1961) 7

Robinson v. Neil, 409 U.S. 505 (1973) . . . . . passim

Sedgewick v. State, 123 S.W.2d 702 (Tex.Crim.App. 1909) 7

Serfass v. United States, 420 U.S. 377 (1975) 8

Steen v. State, 242 S.W.2d 1047 (Tex.Crim.App. 1922) 7

Stone v. Powell, 428 U.S. 465 (1976) 9

United States v. Jorn, 400 U.S. 470 (1971) 8

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) 8

United States v. Rumpf, 576 F.2d 818 (10th Cir. 1976), *cert. denied*, 439 U.S. 893 (1978) 12

United States v. Sisson, 399 U.S. 267 (1970) 8

Vardas v. State, 518 S.W.2d 826 (Tex.Crim.App.), *cert. denied*, 439 U.S. 904 (1975) 7

Von Burleson v. Estelle, 666 F.2d 231 (5th Cir. 1981) 2

Wainwright v. Sykes, 433 U.S. 72 (1977) 9

Yerger v. State, 41 S.W. 621 (Tex.Crim.App. 1897) 7

Other Authorities

J. Stigler, Double Jeopardy (1969) 8

Tex. Pen. Code Ann. §12.42(d) (Vernon 1974) 3

No. 81-_____

* * *

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

* * *

W.J. ESTELLE, JR.,

Petitioner

V.

WALTER VON BURLESON,

Respondent

* * *

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

* * *

PETITION FOR WRIT OF CERTIORARI

* * *

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES W.J. Estelle, Jr., Director, Texas Department of Corrections, Petitioner herein, by and through his attorney, the Attorney General of Texas, and requests that the Court grant this his petition for writ of certiorari, and as grounds therefor, would respectfully show the Court the following:

OPINIONS BELOW

On March 26, 1981, the United States Magistrate in the United States District Court for the Northern District of Texas, Dallas Division, recommended that habeas corpus relief be denied to Walter Von Burleson, a Texas prisoner. (Appendix A). On August 19, 1981, however, the district court in an unpublished order and judgment rejected this recommendation and ordered the writ granted. (Appendix B). On January 22, 1982, a quorum of the United States Court of Appeals affirmed the district court's judgment. (Appendix C). That opinion is *Von Burleson v. Estelle*, 666 F.2d 231 (5th Cir. 1982).

JURISDICTION

This Court has jurisdiction to review the judgment of the Court of Appeals entered January 22, 1982, under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Since this case presents a double jeopardy question, the Fifth and Fourteenth Amendments to the United States Constitution are involved.

STATEMENT OF THE CASE

As the Court of Appeals stated, the facts in this case are undisputed. That court's version is reproduced below.

> Walter Von Burleson was originally indicted for burglary in Cause No. C-71-2216-NI (the "first indictment") on March 22, 1971. Beginning on September 15, 1971, he was tried by a jury. The jury, however, became deadlocked

and, with the consent of both Burleson and the State, the trial court ordered Burleson to stand trial on a subsequent date.

On March 27, 1972, a bill of indictment, titled Cause No. C-72-2890-JI (the "second indictment"), was returned against Burleson alleging the same offense of burglary but containing the allegation, for enhancement purposes, that he had been convicted of two prior felony offenses. On June 7, 1972, after the second indictment had been returned, Burleson again appeared for trial pursuant to the first indictment. The docket entries of the trial court reflect that a petit jury had been selected and sworn, at which point the State advised the court that the prosecution should have proceeded on the second indictment and, on motion of the District Attorney, the first indictment was dismissed.

Subsequently, on October 17, 1972, Burleson was brought to trial, convicted under the second indictment and given a mandatory term of life imprisonment because of the two prior convictions alleged in the second indictment. See Tex. Pen. Code Ann. § 12.42(d)(Vernon 1974).

After an unsuccessful direct appeal, he filed several petitions for writs of habeas corpus in the Texas courts alleging various trial errors. The petitions were denied, at first on the merits and later because of "abuse of the writ." Burleson did not present his double jeopardy claim in his first few petitions, and when, after *Crist*, he made the argument which he advances today, the Texas Court of Criminal Appeals denied habeas relief because of abuse of the writ, never reaching the merits of Burleson's double jeopardy argument. Burleson, after ful-

> ly exhausting his state remedies, then petitioned for federal habeas relief, alleging that he had been unconstitutionally placed twice in jeopardy by dismisal of the first indictment after a jury had been impaneled and sworn and the impaneling of a second jury, trial, and conviction of the charges contained in the second indictment.

Also, as stated by the Court of Appeals, Petitioner has recognized throughout these proceedings that if the first indictment had been dismissed subsequent to this Court's 1978 decision in *Crist v. Bretz*, 437 U.S. 28 (1978), issuance of the writ would be mandated by that decision. Petitioner has argued that *Crist v. Bretz* should not be applied retroactively. The United States magistrate agreed, but both the district court and a quorum of the Court of Appeals disagreed. This petition followed.

SUMMARY OF THE ARGUMENT

Respondent Burleson is entitled to relief if *Crist v. Bretz*, 437 U.S. 28 (1978) is retroactive. That case established that contrary to the rules previously followed in numerous jurisdictions, for purposes of the double jeopardy clause of the United States Constitution, jeopardy attaches when the jury is impaneled and sworn. Under Texas law prior to *Crist v. Bretz*, jeopardy did not attach until the defendant entered a plea to the indictment. This Texas rule dated back at least to 1886.

Robinson v. Neil, 409 U.S. 505 (1973), is the authority addressing perhaps most directly the retroactivity of double jeopardy decisions, a question governed by somewhat different considerations from those noted in such cases as *Linkletter v. Walker*, 381 U.S. 618 (1965). Under *Robinson v. Neil*, *Crist v. Bretz* should be held

nonretroactive for several reasons. First, the error committed by the Texas courts here is more procedural than substantive. That is, it is not a failure of proof in an evidentiary sense within the meaning of authorities such as *Burks v. United States*, 437 U.S. 1 (1978), and *Greene v. Massey*, 437 U.S. 19 (1978). There is no suggestion that the State has had more than one opportunity to muster its proof against Burleson.

Second, the State in good faith relied to its detriment upon the existing rule. The reliance was in good faith because of the virtually ancient status of the Texas attachment of jeopardy rule, which had never been previously successfully attacked during the almost 100 years of its existence. Moreover, the State relied detrimentally upon what it in good faith believed to be the existing rule concerning attachment of jeopardy. Ballancing the unfair prejudice to the State inherent in a holding of retroactivity against the corresponding benefit to the valid interests of criminal defendants, *Crist v. Bretz* should be held prospective only in its application.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

Crist v. Bretz, 437 U.S. 28 (1978), IS NOT RETROACTIVE.

In *Crist v. Bretz*, 437 U.S. 28, 38 (1978), this Court held as follows:

> "[T]he federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy."

Because the Court held the federal jeopardy attachment

rule to be central to the double jeopardy clause, it is now binding upon the states. *Benton v. Maryland,* 395 U.S. 784 (1969).

The facts in this case are undisputed. Respondent Burleson's first indictment in Cause No. C-71-2216-NI was dismissed on June 7, 1972, after the jury had been empaneled and sworn, but before the indictment had been read to the jury or he had entered his plea. He was then reindicted for the same offense in Cause No. C-72-2890-JI, with two prior felony convictions alleged for enhancement, and was retried without objection. No claim of prosecutorial vindictiveness is raised. Thus, he is entitled to relief only if *Crist v. Bretz* is retroactive.

The criteria for determining the retroactivity of decisions involving the double jeopardy clause of the Fifth Amendment were set out in *Robinson v. Neil,* 409 U.S. 505 (1973). There the Court noted that the analysis embodied in *Linkletter v. Walker,* 381 U.S. 618 (1965), which is based upon protecting "the very integrity of the fact finding process," *id.* at 639 is "not appropriate" in the context of double jeopardy decisions, *Robinson v. Neil,* 409 U.S. at 509.

The Court continued to note, however, the "element of reliance embodied in the *Linkletter* analysis ..." *Id.* The Court established a two-prong good faith reliance and prejudice test. This test focuses first on whether the State's reliance on the prior rule was supported by case law such that the new constitutional decision "marked a departure from past decisions of this Court." *Robinson v. Neil,* 409 U.S. at 511. If so, the State's reliance upon earlier constitutional decisions, both state and federal, would obviously be in good faith. Second, the Court felt it important to examine the nature of the prejudice the State would suffer from retroactive application of the constitutional rule and the extent of the unfairness of such prejudice, compared to the beneficial effect upon

the valid interests of defendants in such retroactive application.

This test militates against retroactivity of *Bretz v. Crist.* First, the Texas rule providing for the attachment of jeopardy only after the defendant enters a plea to the indictment dates back at least to 1886. *See, Anderson v. State,* 7 S.W. 40 (Tex. Crim. App. 1886). *See also, Lockridge v. State,* 522 S.W.2d 526 (Tex. Crim. App. 1975); *Vardas v. State,* 518 S.W.2d 826 (Tex. Crim. App.), *cert. denied,* 423 U.S. 904 (1975); *Ochoa v. State,* 492 S.W.2d 276 (Tex. Crim. App. 1973); *Ramirez v. State,* 352 S.W.2d 131 (Tex. Crim. App. 1961); *Steen v. State,* 242 S.W.2d 1047 (Tex. Crim. App. 1922); *Sedgewick v. State,* 123 S.W. 702 (Tex. Crim. App. 1909); *Mays v. State,* 101 S.W. 207 (Tex. Crim. App. 1907); *Yerger v. State,* 41 S.W. 621 (Tex. Crim. App. 1897).

In spite of this long line of Texas authorities, no successful challenge to the Texas rule has ever been mounted in either state or federal court. This is not surprising in light of the slowly developing federal case law that gave no serious suggestion of the forthcoming *Bretz* rule. This Court did not establish that jeopardy attaches in federal criminal proceedings when the jury is empaneled and sworn until *Downum v. United States,* 372 U.S. 734 (1963). At the time, the federal double jeopardy clause was not binding upon the states. Incorporation of the clause through the Fourteenth Amendment occured in *Benton v. Maryland,* 395 U.S. 784 (1969).

It is obvious but critical that although *Benton* made the double jeopardy clause applicable to the states, only those federal holdings of constitutional magnitude would be so applicable. Any holding implemented because of the Court's supervisory powers over federal prosecutions would not be binding upon the states.

After *Benton*, the Court discussed the federal attachment of jeopardy rule on five occasions: *United States v. Sisson*, 399 U.S. 267 (1970); *United States v. Jorn*, 400 U.S. 470 (1971) (plurality opinion); *Illinois v. Sommerville*, 410 U.S. 458 (1973); *Serfass v. United States*, 420 U.S. 377 (1975); and *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). Only one of these cases, *Illinois v. Sommerville*, involved a state criminal prosecution. And *Sommerville*, as conceded by the majority in *Crist v. Bretz*, 437 U.S. at 38, merely "assumed" the applicability of the federal standard, which was not in issue. Indeed, the record in that case reflects that the Illinois and federal rules were indentical. *People v. Grevan*, 23 Ill. App.3d 997, 320 N.E.2d 476 (App. Ct. 1974); *People v. Green*, 74 Ill.App.2d 308, 218 N.E. 2d 840 (1966), *cert. denied*, 387 U.S. 930 (1967). That the Court for nine years following *Benton v. Maryland* did not invalidate a single state attachment of jeopardy rule supports the State's contention herein that its reliance on the Texas rule was reasonable and in good faith.

Examination of *Crist v. Bretz* itself makes this conclusion even clearer. The federal rule has little if any historical antecedent. *Crist v. Bretz*, 437 U.S. at 40-47 (dissenting opinion of Powell, J.). *See also*, J. Sigler, Double Jeopardy 1-37 (1969). *Bretz* was decided by a 6-3 margin. Chief Justice Burger in dissent argued that there was no sound basis for arbitrarily extending the federal rule to the states.

> Principles of federalism should not so readily be compromised for the sake of a uniformity finding sustenance perhaps in considerations of convenience but certainly not in the Constitution. Countless times in the past 50 years this court has extolled the virtues of allowing the states to serve as laboratories to experiment with procedures which differ from those followed in the federal courts. Yet we continue to

> press the states into a procrustean federal mold.

Crist v. Bretz, 437 U.S. at 39-40.

Indeed, the majority opinion in this sense is directly contrary to the trend in recent years according more weight to reasonable state rules and procedures. *E.g.*, *Wainwright v. Sykes*, 433 U.S. 72 (1977) (violation of state contemporaneous objection rule bars federal habeas corpus relief); *Estelle v. Gamble*, 429 U.S. 97 (1976) (federal courts may not inquire into quality of state prisoners' medical care unless deliberate indifference to such needs is alleged); and *Stone v. Powell*, 428 U.S. 465 (1976) (federal habeas corpus unavailable for Fourth Amendment claim if state has provided opportunity to raise such claim).

Finally, three Justices in *Bretz* believed that the Montana rule in issue was equally "consonant with the central concerns of the Double Jeopardy Clause" as the federal rule. *Crist v. Bretz*, 437 U.S. at 52. The dissenters also opined that even if they were convinced the federal rule was superior to the Montana rule, they would not hold the federal rule binding upon that state. *Id.* Finally, they concluded, there is "no reason for this Court to impose what, in effect, is no more than a supervisory rule of practice upon the courts of every state in the Union." *Id.* at 53.

Petitioner's purpose in drawing forth these observations from the *Bretz* dissenters is not to show that the case was wrongly decided. Respondent merely seeks to show that the *Bretz* opinion was not reasonably foreseeable and, therefore, in the instant case the reliance of the Dallas County district attorney on the Texas rule was in good faith. Surely, if three Justices of this Court were astonished at the Bretz holding, the prosecutors in Texas have been justified in relying upon the

state rule. And, under *Robinson v. Neil*, that is the first portion of what is necessary to support a finding of nonretroactivity of the *Bretz* rule.

Moreover, especially in light of Texas criminal procedures, a holding of retroactivity would be unfairly prejudicial to the State and without corresponding benefit to the valid interests of criminal defendants. First, in Texas the accused is typically arraigned immediately after the jury has been empaneled and sworn. As a practical matter, it is difficult to imagine how the Texas jeopardy attachment rule would have failed to provide the same protections as those provided by the federal rule.

For these reasons, it also appears that the holding in *Bretz* is more akin to a procedural that a substantive change in the law. The magistrate in the court below discussed this point at length in his recommendations entered March 26, 1981. (Appendix A). It cannot be gainsaid that the right of a defendant to have a particular jury, once chosen, decide his case, is an important one. That is the right that furnished the basis of the decision in *Crist v. Bretz*. As discussed above, however, under Texas procedure and undoubtedly under the procedures commonly utilized in many other states, the impaneling of the jury, reading of the indictment, plea of the defendant, and swearing in of the first witness are all events that occur within a few scant moments. It is exceedingly difficult to perceive how a rule under which jeopardy attaches a few seconds earlier substantially protects to a greater extent the admittedly important right to have a particular jury hear a defendant's case.

If the prosecutor in Respondent Burleson's case, for example, disliked the jury that was about to be impaneled, he simply could have moved for a dismissal a few moments earlier than he did. To be sure, there might be

a case in which the change in the attachment of jeopardy rule would offer greater protection to the rights of defendants. There may be a jurisdiction where the change would constitute a more fundamental difference than in Texas. And there may be some advantage to having a single rule for all jurisdictions. Indeed, these considerations were the underpinnings of the majority's holding in *Crist v. Bretz.*

It is nonetheless true that these considerations neither are so apparent now nor were so foreseeable at the time of Burleson's trial that they fairly favor a holding of retroactivity of *Bretz.* Although Bretz seeks to protect an important substantive right, the means by which it seeks to achieve this goal is procedural, not substantive.

The district court and the Court of Appeals disagreed with this approach in large part because they appeared to assume that all double jeopardy decisions are retroactive. Such an assumption underlies the attempted distinction between double jeopardy guarantees and procedural ones, as well as the circular argument that double jeopardy decisions should be retroactive because the purpose of the right is to prevent the occurrence of a second trial.

Similarly, the Court of Appeals wrongly refused to accord any weight to the State's good faith-detrimental reliance argument. The court erroneously construed the State's argument as elevating the reliance factor above all others and erroneously construed this Court's holding in *Robinson v. Neil* as obliterating that factor altogether. In this manner the Court of Appeals is effect established a per se rule of retroactivity for double jeopardy decisions.

This Court plainly stated, however, in *Brown v. Louisiana,* 447 U.S. 323, 327 (1979):

> "[I]t is clear that resolution of the question of retroactivity does not automatically turn on the particular provision of the Constitution on which the new prescription is based."

Clearly not all double jeopardy decisions are retroactive; if they were, this Court would not have found it necessary to establish the *Robinson v. Neil* test for determining the retroactivity of such decisions. *See also,* such cases as *Jackson v. Justices of the Superior Court of Massachusetts,* 549 F.2d 215 (1st Cir.), *cert. denied,* 430 U.S. 975 (1977), and *United States v. Rumpf,* 576 F.2d 818 (10th Cir. 1976), *cert. denied,* 439 U.S. 893 (1978), each of which held double jeopardy decisions of this Court nonretroactive. Surely, to distinguish between double jeopardy and all other decisions per se is in large measure to beg an important part of the question. And if there were ever a double jeopardy decision that should be held prospective only, the State respectfully suggests that it is that in *Crist v. Bretz.*

Finally, the unfair prejudice to the state by retroactive application of *Bretz* is abundantly illustrated by the facts of the instant case. First, it is possible that the prosecutor might have moved for dismissal of the first indictment prior to the empanelment and swearing in of the jury, if only he had known that *Crist v. Bretz* would be decided six years later. Second, even after the jury was selected and empaneled the prosecutor might still have validity proceeded upon the primary offense without enhancing allegations if only he had known *Bretz* was coming. Or he might well have re-indicted the defendant upon a *different* felony charge with the newly discovered enhancing allegations. Now, of course, prosecution is impossible upon any of such other offenses because of the applicable statutes of limitations.

Indeed, now, if *Crist v. Bretz* is applicable, Respondent Burleson, an otherwise validly convicted habitual

offender, goes free. Such an unfair result should not be allowed.

II.

THIS COURT SHOULD REVIEW THIS IMPORTANT ISSUE

Petitioner cannot know with certainty the numbers of convictions that may eventually be invalidated by the holding of the Court of Appeals in this case or similar holdings elsewhere, but each such result is significant. Further, Petitioner submits that both the federal and state judiciary have experienced great difficulty in applying *Robinson v. Neil*, 409 U.S. 505 (1973). This case presents an ideal opportunity for this Court to illustrate the proper application of retroactivity principles in a double jeopardy context.

CONCLUSION

For these reasons, Petitioner respectfully prays that the petition for writ of certiorari be granted, and the judgment of the Court of Appeals be reversed.

Respectfully submitted,
MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

DOUGLAS M. BECKER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys For Petitioner

Appendix

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Walter Von Burleson	)	
	)	
VS.	)	
	)	**CA3-81-119-D**
W. J. Estelle, Director, TDC	)	
	)	

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

Pursuant to the provisions of 28 U.S.C. 636(b), and an Order of the Court in implementation thereof, the subject cause has previously been referred to the United States Magistrate. The findings, conclusions and recommendation of the Magistrate, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Type Case: This is a petition for writ of habeas corpus relief filed by a State inmate pursuant to 28 U.S.C. §2254.

Parties: The Petitioner is an inmate at the Eastham Unit of the Texas Department of Corrections at Lovelady, Texas, serving a felony conviction for the offense of burglary.

The Respondent is the Director of the Texas Department of Corrections.

Statement of the Case: The facts pertinent to the Petitioner's sole ground for relief are simple and uncon-

troverted. However, in light of the "Findings of Fact and Conclusions of Law" filed by the State District Court in Petitioner's most recent State application for relief (See Application No. 2244 [Writ No. W-80-20024-I] at pages 8-9) it is appropriate to identify the full set of facts and circumstances pertaining to the Petitioner's present conviction commencing with his indictment in Cause No. C-71-2216-NI.

The Petitioner was indicted in Cause No. C-71-2216-NI on March 22, 1971. Beginning on September 15, 1971, the Petitioner was tried by a jury upon a plea of not guilty. On Septemer 17, 1971, the jury notified the court that it was hopelessly deadlocked, and upon consent of both the State and the Petitioner the trial court declared that the jury was hung and ordered that the Petitioner stand trial on a subsequent date.

On June 7, 1972, the Petitioner again appeared for trial pursuant to the indictment in Cause No. C-71 -2216-NI. The docket entries of the District Court reflect that a petit jury was impaneled, at which point the State advised the court that the prosecution should have proceeded on a reindictment, to wit: C-72-2890-JI. On June 8, 1972, the indictment in C-71-2216-NI was dismissed on motion of the District Attorney (Id., pages 28-29).

The docket records in Cause No. C-72-2890-JI reflect that a bill of indictment was returned against the Petitioner alleging the offense of burglary and enhanced with the allegation that the Petitioner had twice previously been convicted of felony offenses. This indictment was returned on March 27, 1972, several months prior to the date that a seocnd jury had been impaneled and sworn in Cause No. C-71-2216-NI. The docket records in the subsequent case specifically reflect that the jury in C-71-2216-NI had been selected and sworn in prior to the District Attorney's motion to dismiss such cause (Id., pages 23-24). On October 17,

1972, the jury was impaneled in Cause No. C-72-2890-JI and the Petitioner was tried and convicted on the primary charge and was assessed a mandatory term of life imprisonment upon the jury's verdict of true to the prior convictions alleged in the indictment. The Petitioner effected a direct appeal and the Court of Criminal Appeals affirmed in an opinion in *Von Burleson v. State*, 505 S.W.2d 553 (Tx.Crim.App. 1974).

The Petitioner has filed numerous applications for relief pursuant to Article 11.07 of the Texas Code of Criminal Procedure. On each occasion relief was denied culminating with an order entered by the Texas Court of Criminal Appeals on June 14, 1978, finding that the Petitioner was abusing the writ of habeas corpus. In addition, the Petitioner has filed multiple applications for relief in the courts of this District. The most recent prior application filed in CA3-79-1552-R was dismissed without prejudice by order of the District Court, after first adopting the findings and conclusions of the Magistrate filed on July 9, 1980. The Petitioner returned to the courts of the State of Texas and sought relief in a writ docketed in the District Court in Writ No. W-80-20024-I. Although the State District Court made specific Findings of Fact and Conclusions of Law and entered the same on November 3, 1980, no action was taken by the Court of Criminal Appeals, noting on November 19, 1980, that the Petitioner had been held to have abused the writ.

The Petitioner's sole ground for relief is the claim that his prosecution in Cuase No. C-72-2890-JI was barred by the Fifth Amendment proscription against "double jeopardy", in which the same primary offense was alleged.

Petitioner has clearly exhausted available State remedies.

The Petitioner's sole ground for relief is the claim that his prosecution in Cause No. C-72-2890-JL was barred by the Fifth Amendment proscription against "double jeopardy", after a jury had been impaneled and sworn in C-71-2216-NI in which the same primary offense was alleged.

Petitioner has clearly exhausted available State remedies.

Findings and Conclusions: As noted above, the salient facts present in the Petitioner's case are that (1) a jury was impaneled and sworn in to try the Petitioner in C-71-2216-NI, at which time prior to arraignment and prior to the receipt of any evidence the State moved to dismiss the case, which was so ordered by the court; (2) the Petitioner was subsequently tried in C-72-2890-JI for the same offense charged in the prior case. Whether the Petitioner is entitled to relief is wholly dependent upon whether the Supreme Court's decision in *Crist v. Bretz,* 437 U.S. 28 (1978), is to be retroactively applied. There is no question that if *Crist v. Bretz* be given retroactive effect its holding requires that Petitioner's application be granted.

Before considering the ground asserted by the Petitioner it is necessary to determine whether relief is barred in this court by application of the State "contemporaneous objection rule". See *Wainwright v. Sykes,* 433 U.S. 72 (1977). It is settled law in this Circuit that application of a State's "contemporaneous objection rule" derives from the doctrine of comity, and will bar consideration of claims only in those instances in which the State courts denied relief upon an application of the State's contemporaneous objection rule. See *Moran v. Estelle,* 607 F.2d 1140 (5th Cir. 1979).

A review of prior State applications by the Petitioner asserting the ground presently raised reflects that the

Court of Criminal Appeals has not reached the merits of his claim. To the contrary, in each instance the Court of Criminal Appeals has cited the Petitioner for an abuse of the writ.[1] A review of Texas State substantive law, however, demonstrates that Texas State courts do not apply a "contemporaneous objection rule" to grounds arising under the Fifth Amendment. The Court of Criminal Appeals has held that a "double jeopardy" claim is jurisdictional in nature and is not waived even by a plea of guilty. *Ex Parte Moorehead*, 598 S.W.2d 895 (en banc) (Tx.Crim.App. 1980); cf. *Ellis v. State*, 502 S.W.2d 146, at page 147 (Tx.Crim.App. 1973); *Jones v. State*, 502 S.W.2d 164 (Tx.Crim.App. 1973). Since the courts of the State of Texas do not apply a contemporaneous objection rule to "double jeopardy" claims, the prohibition against consideration of the merits pursuant to *Wainwright v. Sykes*, *supra*, is wholly inapposite.

In this court's prior recommendation in CA3-79-1552-R the Magistrate observed that the question of whether a Supreme Court decision should be retroactively applied is one that is not susceptible to a facile solution. Further, because the considerations which may apply in making the ultimate determination encompass inquires perhaps more appropriately undertaken by the courts of the states, the Magistrate recommended that the Petitioner's prior application be dismissed without prejudice. This court also opined that under the circumstances present in the Petitioner's pursuit of habeas corpus relief on the ground now raised that it appeared likely that the merits of his claim would be considered notwithstanding the fact that he had previously been cited for an abuse of the writ.

---

[1] See, however, Petitioner's applic- tion at page 14 and 16-18 which was denied on the merits by the Court of Criminal Appeals on November 9, 1977.

The Texas State courts have declined to consider the merits of Mr. Von Burleson's claim and again have cited him for abuse of the writ. This may stem in part from the trial court's misapprehension of the basis for Petitioner's claim. It appears that the State trial court in his most recent Findings of Fact believed that the Petitioner's ground was predicated upon the fact that a subsequent prosecution was sought after the first jury had been unable to reach a verdict resulting in a mistrial. It is firmly established that a retrial in such circumstances does not constitute double jeopardy. *United States v. Perez,* 22 U.S. 579 (1824).

Upon careful review of the cases it appears that only one Federal court has addressed the question of whether the holding in *Crist v. Bretz* is subject to retroactive application. In *Mizell v. Attorney General of State of New York,* 586 F.2d 942, 946-947 (2nd Cir. 1978), cert. den. 440 U.S. 967 (1979), the court held that *Crist* was retroactive. However, this determination was not necessary for the holding in that case. In another case considering the retroactive application of the impact of the double jeopardy clause of the Fifth Amendment the First Circuit in considering the affect of *Breed v. Jones,* 421 U.S. 519 (1975), pertaining to juvenile delinquency, eschewed a *per se* retroactive application, e.g. *Robinson v. Neal,* 409 U.S. 505 (1973), and chose to follow the three factor test first enunciated in *Linkletter v. Walker, 381 U.S. 618 (1965), on a case-by-case basis. See Jackson v. Justices of Superior Court of Massachusetts,* 549F.2d 215 (1st Cir. cert. den. 430 U.S. 975 (1977).

In deciding the retroactive effect, if any, of *Crist v. Bretz* it appears that this court proceeds upon uncharted waters.

It is my opinion that the better rule in the instant case is to apply the three factor test. While arising under

the Fifth Amendment, the decision in *Crist v. Bretz* appears to be more kin to procedural law than to substantive law. As distinguished from the facts and holdings in *Burks v. United States,* 437 U.S. 1 (1978) and *Greene v. Massey,* 437 U.S. 19 (1978), in which the Petitioners had undergone a trial on the merits, the Petitioner in the present case was not subject to two separate trials.[2] Further, in the absence of actual commencement or completion of a criminal trial, prior to the Supreme Court's decision in *Crist v. Bretz, supra,* the courts of the States followed differing standards as to the precise moment at which jeopardy attached. Many State courts fixed the attachment of jeopardy at the swearing of the jury. See *Crist v. Bretz, supra,* Note 11, page 46. Others, however, such as Montana fixed jeopardy at a different point, to wit: upon the swearing of the first witness. The historical Texas rule fixed jeopardy at that point at which the defendant entered a plea to the indictment.

That the Supreme Court left these varying rules applicable prior to the commencement of trial on the merits undistrubted for many years and in fact refused to consider the issue on occasion, e.g. *Vardas v. State,* 518 S.W.2d 826 (Tx.Crim.App.) cert. den. 423 U.S. 904 (1975) strongly militates against a view that the Supreme Court's decision in *Crist v. Bretz* was occasioned by the necessity to vindicate a substantive constitutional right. The difference between the situation of an accused whose trial is terminated before any witness is sworn and that of an accused who has endured an entire trial only to be subject to another prosecution upon a

---

[2]This court recognizes that Petitioner was tried twice, but since the first trial resulted in a mistrial, no double jeopardy claim arises from this initial aborted prosecution. *United States v. Perez, supra.*

reversal on sufficiency of the evidence grounds a la *Burks* and *Greene* is patently obvious. It appears equally obvious that such harm is less egregious than that suffered by an accused whose confession was obtained without a *Miranda*-styled warning or an accused subject to a lineup identification without the presence of counsel. In both these latter circumstances the Supreme Court refused to give retroactive effect to its rulings. See *Johnson v. New Jersey,* 384 U.S. 719 (1966); and *Stovall v. Denno,* 388 U.S. 293 (1967). Most importantly, however, is that the Supreme Court's decision in *Crist v. Bretz* was not precipitated by a perceived course of conduct by either the prosecution or law enforcement officers which was calculated to or had the potential of serious abridgement of rights absent judicial constraints.

Ordinarily procedural changes in the law are given prospective effect only. However, I believe that to construe the Supreme Court's decision in *Crist v. Bretz* as being purely a matter of procedure would be to fail to give appropriate deference to the constitutional standard therein enunciated. Accordingly, I proceed to analyze the Petitioner's case under the three-prong standard, to wit: (a) the purpose to be served by the new standard, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the affect on the administration of justice of a retroactive application of the new standard.

The stated basis for the Supreme Court's decision in *Crist v. Bretz* is the "need to protect the interests of an accused in retaining a given jury (at page 35)". See also *Illinois v. Somerville,* 410 U.S. 458 (1973). In asserting his present ground both in the State and Federal courts the Petitioner has never claimed that he was prejudiced in not being tried by the jury selected and impaneled on June 7, 1972. Further, unlike the Petitioner in *Somerville* no objection was made at the time the trial court

discharged the jury and dismissed the first indictment. It is further noteworthy that the Supreme Court in *Somerville, supra,* did not find that the Petitioner could not be tried a second time pursuant to a valid indictment. In applying the *Linkletter* standard the standard itself rather than the facts present in a given case must be considered. However, as noted above I am of the opinion that the right to a "particular jury" is not of such moment as to warrant application to those cases, such as the Petitioner's, in which the conviction has long since become final.

The second standard appears to apply solely to law enforcement officers as distinguished from the prosecutorial and judicial authorities. Indeed, the rights considered iin *Linkletter v. Walker, supra, Stovall v. Denno,* 388 U.S. 293 (1967) and *Desist v. United States,* 394 U.S. 244 (1969), pertained to investigatory conduct prior to the adjudication process. If the reliance factor apply to the actions of the prosecutor and/or the presiding judge, prospective application only is strongly suggested. The first indication that dismissal of an indictment after a jury had been impaneled and sworn might present a question of constitutional dimensions was the Supreme Court's decision in *Illinois v. Somerville, supra,* which was decided four months after the Petitioner's trial and conviction in C-72-2890-JI. The Texas rule fixing the point at which jeopardy attached, to wit: upon the defendant's plea to the indictment, dates back at least to 1886. *Anderson v. State,* 7 S.W.2d 40 (Tx.Crim.App. 1886). The Surpeme Court did not establish the "jeopardy point" in Federal criminal proceedings until its decision in *Downum v. United States,* 372 U.S. 734 (1963). As noted above, the Supreme Court denied certiorari on the issue arising out of a Texas State prosecution approximately two years after its decision in *Somerville, supra.* See *Vardas v. State, supra.* It is worthy of note that the three dissenting justices in *Crist v. Bretz* were of the opinion that the

question of when jeopardy attached prior to trial was a matter for the states to decide. At the time of Petitioner's trial the decisional law of the Supreme Court did not foretell or render reasonably foreseeable that the question of when jeopardy attached in a criminal case was of constitutional consequence. Under such circumstances neither the prosecutor nor the trial judge can be faulted for following long-standing Texas precedent.

The final criterion is not easy to assay. Indeed, one of the reasons this court formerly recommended dismissal without prejudice was to permit the Texas State courts to make an assessment of the retroactive consequences. However, it is clear that the courts of Texas have not chosen to consider Petitioner's application. Suffice it to say that were *Crist v. Bretz* to be given retroactive effect, all persons presently serving final convictions in the Texas Department of Corrections which were preceeded by a prior indictment alleging the same offense, dismissed after a jury was impaneled and sworn but prior to arraignment, would be eligible for habeas corpus relief. The Respondent has provided no information to determine the numeroisty of such affected inmates. To accomplish such a feat would require an examination of all dockets in all causes for which inmates presently stand committed. However, it does not appear that this third criterion requires a custodian to adduce precise evidence to identify the effect which retroactive application would have. While this court is certainly not privy to the records which were before the Supreme Court, it appears that the Court applied a "common sense" assessment of effect in *Linkletter v. Walker, supra, Johnson v. New Jersey, supra, District v. United States, supra,* and *Stovall v. Denno, supra.*

Unquestionably, to give retroactive affect to *Crist v. Bretz* would undermine the finality of convictions. Another detremental affect which would be visted upon

the administration of justice in Texas is that all prior convictions obtained after dismissal of a former action after a jury had been impaneled and sworn, would become invalid and thus unavailable for enhancement in a subsequent criminal prosecution.

For the above stated reasons in applying the three-prong test I am of the opinion that retroactive affect should not be given to the Supreme Court's decision in *Crist v. Bretz, supra.* Since the Petitioner's conviction became final in 1974, he may not obtain relief in the present application.

Moreover, in considering the rights of the Petitioner this court must be mindful of the interests of society at large. The records before this court reflect that the Petitioner has been convicted on three separate occasions of felony offenses. Neither the actions of the prosecutor or the trial judge were motivated by malice or with design to infringe any right of the Petitioner. Unlike those courses of conduct which the courts have determined require the imposition of an "exclusionary rule", to insure respect for and protection of constitutional rights, no purpose would be served in the overall administration of justice or the protection of constitutional rights by granting the Petitioner relief. It is self-evident from the record that the prosecutor made a *bona fide* mistake. Simply stated, he proceeded on the wrong indictment, even though both indictments had been returned at the time the jury was selected in June of 1972. To permit this human error and the conduct of the trial court in dismissing the indictment in a manner wholly consistent with the then existing Texas State law to exonerate the Petitioner would be to disregard the rights of the public to a modicum of security from the criminal conduct of the Petitioner and would give no little credence to Dickens's unkind observations on the law.

RECOMMENDATION:

For the foregoing reasons it is recommended that the Petitioner's application be denied and dismissed.

/s/ Wm. F. Sanderson, Jr.

UNITED STATES MAGISTRATE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Walter Von Burleson	§	
	§	
VS.	§	
	§	**CA-3-81-119-D**
W. J. Estelle, Director,	§	
TDC	§	

ORDER

Came on for consideration before the Court, Honorable Robert M. Hill, presiding, the Findings, Conclusions and Recommendation of the United States Magistrate on Walter Von Burleson's (Petitioner) application for a writ of habeas corpus. Having considered the application, the record and all other pleadings the Court is of the opinion that the Recommendation of the Magistrate should not be adopted and the writ should be granted.

The Magistrate has fairly summarized the factual basis of this action. The Petitioner was indicted in Cause No. C-71-2216-NI on March 22, 1971. Beginning on September 15, 1971, the Petitioner was tried by a jury upon a plea of not guilty, on September 17, 1981, the jury notified the court that it was hopelessly deadlocked, and upon consent of both the State and the Petitioner the trial court declared that the jury was hung and ordered that the Petitioner stand trial on a subsequent date.

On June 7, 1972, the Petitioner again appeared for trial pursuant to the indictment in C-71-2216-NI. The docket entries of the District Court reflect that a petit

jury was impaneled, at which point the State advised the court that the prosecution should have proceeded on a re-indictment, Cause No. C-72-2890-JI. On June 8, 1972, the indictment in C-71-2216-NI was dismissed on motion of the District Attorney.

The docket records in C-72-2890-JI reflect that a bill of indictment was returned against the Petitioner alleging the offense of burglary and enhanced with the allegation that the Petitioner had twice previously been convicted of felony offenses. This indictment was returned on March 27, 1972, several months prior to the date that a second jury had been impaneled and sworn in C-71-2216-NI. The docket records in the subsequent case specifically reflect that the jury in C-71-2216-NI had been selected and sworn in prior to the District Attorney's motion to dismiss such cause. On October 17, 1972, the jury was impaneled in C-72-2890-JI and the Petitioner was tried and convicted on the primary charge and was assessed a mandatory term of life imprisonment upon the jury's verdict of true to the prior convictions alleged in the indictment. The Petitioner effected a direct appeal and the Court of Criminal Appeals affirmed. *Von Burleson v. State,* 505 S.W.2d (Tx.Crim.App. 1974).

The Petitioner has filed numerous applications for relief pursuant to Article 11.07 of the Texas Code of Criminal Procedure. On each occasion relief was denied culminating with an order entered by the Texas Court of Criminal Appeals on June 14, 1978, finding that the Petitioner was abusing the writ of habeas corpus. In addition, the Petitioner has filed multiple applications for relief in the courts of this District. The most recent prior application filed in CA-3-79-1552-R was dismissed without prejudice by order of the Court, after first adopting the findings and conclusions of the Magistrate filed on July 9, 1980. The Petitioner returned to the courts of the State of Texas and sought relief in a writ

docketed in the District Court in Writ No. W-80-20024-I. Although the State District Court made specific Findings of Fact and Conclusions of Law and entered the same on November 3, 1980, no action was taken by the Court of Criminal Appeals, noting on November 19, 1980, that the Petitioner had been held to have abused the writ. Petitioner has clearly exhausted available state remedies.

The Petitioner's sole ground for relief is the claim that his prosecution in C-72-2890-JI was barred by the Fifth Amendment proscription against "double jeopardy," after a jury had been impaneled and sworn in C-71-2216-NI in which the same primary offense was alleged.

Whether Petitioner is entitled to relief is wholly dependent upon whether the Supreme Court's decision in *Crist v. Bretz*, 437 U.S. 28 (1978), is to be retroactively applied. In light of the Texas Court of Criminal Appeals' decision in *Ex Parte Myers*, No. 67,451, decided June 17, 1981, the language of *Crist*, and other Supreme Court precedents, the Court believes *Crist* should be applied retroactively.

In *Crist*, 435 U.S. at 38, the Supreme Court held that the "federal rules that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy," thus making the rule binding on the states through the Fourtaeenth Amendment. In reaching this conclusion, the Supreme Court characterized the rule as more than a mere arbitrary exercise of linedrawing, but rather it "serves as the lynchpin for all double jeopardy jurisprudence." *Id.* at 37, 38. The Supreme Court clearly established the rule as being fundamental in the constitutional scheme.

The federal rule that jeopardy attaches as soon as the jury is sworn was established in 1963. *Downum v.*

United States, 372 U.S. 734 (1963). Later, the double jeopardy clause was held to be so fundamental to our scheme of justice that the same constitutional standards were mandated for both the state and federal governments. *Benton v. Maryland*, 395 U.S. 784 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1937)). Both *Downum* and *Benton* were decided prior to Petitioner's trial and served as notice that the question of when jeopardy attached was clearly one of constitutional significance. The Supreme Court in *Crist* easily disposed of this issue when it stated:

> Although it has thus long been established that jeopardy may attach in a criminal trial that ends inconclusively, the precise point at which jeopardy does attach in a jury trial might have been open to doubt before this Court's decision in *Downum v. United States* . . . . The Court thus necessarily pinpointed that stage in a jury trial that jeopardy attaches, and the *Downum* case has since been understood as explicit authority for the proposition that jeopardy attaches when the jury is empaneled and sworn.

437 U.S. at 35.

The Magistrate analyzed the Petitioner's case under the three-pronged test of *Linkletter v. Walker*, 381 U.S. 618 (1965), recognizing that *Crist* enunciated an important constitutional standard, but feeling that it is the type of procedural guarantee that the *Linkletter* line of cases have given only prospective effect. However, the guarantee against being placed in double jeopardy has the effect of preventing a trial from taking place at all, rather than prescribing procedural rules that govern the conduct of the trial, and is therefore not readily susceptible to anlysis under the *Linkletter* line of cases. *Robinson v. Neil*, 409 U.S. 505, 508-09 (1973).

In *Mizell v. Attorney General of State of New York*, 586 F.2d 942, 946-47 (2d Cir. 1978), *cert. denied*, 440 U.S. 967 (1972), the Second Circuit held on the strength of *Robinson* that *Crist* was to be applied retroactively, construing *Robinson* as establishing almost a *per se* rule of retroactivity in double jeopardy cases. Similarly, in *Holt v. Black*, 550 F.2d 1061 (6th Cir. 1977), *cert. denied*, 432 U.S. 910 (1977), the Sixth Circuit held *Robinson* to be dispositive of the question of the retroactive effect of *Breed v. Jones*, 421 U.S. 519 (1975)(Juvenile delinquency hearing bars later adult trial). *But see Jackson v. Justices of Superior Court*, 549 F.2d 215 (1st Cir.), *cert. denied*, 430 U.S. 975 (1977).

The Texas Court of Criminal Appeals has also decided that *Crist* is to be retroactively applied in *Ex Parte Myers*, No. 67,451, decided June 17, 1981. The Court of Criminal Appeals gave two reasons for the result. First, the combination of *Downum* and *Benton* was considered to amount to a recipe by the Supreme Court to be followed once a *Crist* factual situation arose. In this regard, *Crist* was not establishing new and overruling principles of law. *Id.*; *Mizell*, 586 F.2d at 946. *Secondly*, the Court relied on *Robinson* as clearly differentiating between the relative values of the guarantee against double jeopardy and procedural guarantees.

Based on the above analysis, the Court is of the opinion that Petitioner's writ of habeas corpus should be granted and an appropriate judgment entered.

It is so ORDERED.

Dated this 19 day of August, 1981.

/s/ Robert M. Hill

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Walter Von Burleson	§	
Plaintiff	§	
V	§	
		CIVIL ACTION NO.
	§	**CA3-81-119-D**
W. J. Estelle, Director,	§	
TDC	§	
Defendant	§	

JUDGMENT

After making an independent review of the pleadings, files and records in this case, the Court is of the opinion that the petitioner should be granted the relief sought.

IT IS THEREFORE, ORDERED that:

1. Upon this judgment becoming final all charges against Petitioner arising out of Indictment No. C-72-2890-JI are to be dismissed and Petitioner released from the criminal charges in the indictment.

2. The Clerk of this Court shall transmit a true copy of this judgment, together with a true copy of the Memorandum Opinion and Order, to Petitioner, to Respondent, and the Honorable Don Metcalfe, Judge, Criminal District Court No. 2, Dallas County, Texas.

Signed and Entered this 19 day of August, 1981.

/s/ Robert M. Hill

United States District Judge

APPENDIX C

Walter VON BURLESON,
Petitioner-Appellee,

v.

W. J. ESTELLE, Jr., Director, Texas Department of Corrections,
Respondent Appellant.

No. 81-1401.

United States Court of Appeals,
Fifth Circuit.

Jan. 22, 1982.

Appeal from the United States District Court for the Northern District of Texas.

Before GARZA and RANDALL, Circuit Judges*.

RANDALL, Circuit Judge:

All parties agree that the only question for determination in this case is whether the principle announced in *Crist v. Bretz*, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978)—that the federal rule that jeopardy attaches when the jury is impaneled and sworn is an integral part of the fifth amendment guarantee against double jeopardy and applies to the states through the fourteenth amendment—is retroactive. We hold that it is, and we affirm the judgment of the district court granting the writ.

---

*Due to his death on December 22, 1981, Judge Ainsworth did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. 46(d).

The facts pertinent to this petition for habeas relief under 28 U.S.C. § 2254 are undisputed. Walter Von Burleson was originally indicted for burglary in Cause No. C-71-2216-NI (the "first indictment") on March 22, 1971. Beginning on September 15, 1971, he was tried by a jury. The jury, however, became deadlocked and, with the consent of both Burleson and the State, the trial court ordered Burleson to stand trial on a subsequent date.

On March 27, 1972, a bill of indictment, titled Cause No. C-72-2890-JI (the "second indictment"), was returned against Burleson alleging the same offense of burglary but containing the allegation, for enhancement purposes, that he had been convicted of two prior felony offenses. On June 7, 1972, after the second indictment had been returned, Burleson again appeared for trial pursuant to the first indictment. The docket entries of the trial court reflect that a petit jury had been selected and sworn, at which point the State advised the court that the prosecution should have proceeded on the second indictment and, on motion of the District Attorney, the first indictment was dismissed.

Subsequently, on October 17, 1972, Burleson was brought to trial, convicted under the second indictment and given a mandatory term of life imprisonment because of the two prior convictions alleged in the second indictment. See Tex.Pen.Code Ann. § 1242(d) (Vernon 1974).

After an unsuccessful direct appeal, he filed several petitions for writs of habeas corpus in the Texas courts alleging various trial errors. The petitions were denied, at first on the merits and later because of "abuse of the writ." Burleson did not present his double jeopardy claim in this first few petitions, and when, after *Crist*, he made the argument which he advances today, the Texas Court of Criminal Appeals denied habeas relief because

of abuse of the writ, never reaching the merits of Burleson's double jeopardy argument. Burleson, after fully exhausting his state remedies, then petitioned for federal habeas relief, alleging that he had been unconstitutionally placed twice in jeopardy by dismissal of the first indictment after a jury had been impaneled and sworn and the impaneling of a second jury, trial, and conviction of the charges contained in the second indictment. The State reecognized that if the first indictment had been dismissed subsequent to the Supreme Court's 1978 decision in *Christ*, issuance of the writ would be mandated by that decision. It argues, however, that Texas law prior to *Crist*, and in effect at the time of Burleson's conviction, provided for attachment of jeopardy only after the defendant entered a plea to the indictment after the jury had been impaneled and sworn and was thus materially different from the mandate of *Crist*. The State asserts that the *Crist* ruling should not retroactively apply a different attachment of double jeopardy principle to nullify Burleson's conviction.

The district court found that the *Crist* decision should be applied retroactively to Burleson's conviction and ordered that the writ be granted.

In our attempt to determine whether *Crist* should be applied retroactively, *Robinson v. Neil*, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973). provides some guidance to us. In *Robinson*, the Court held retroactive the proscription against prosecution for the same crime in municipal court and again in state court. Such prosecution had previously been declared violative of the double jeopardy clause in *Waller v. Florida*, 406 U.S. 906, 92 S.Ct. 1608, 31 L.Ed.2d 816 (1972). Thus, *Waller* applied to Robinson's conviction which occurred prior to the *Waller* decision. The Court indicated that, at least in some double jeopardy cases, the factors to determine retroactivity of procedural constitutional rulings set forth in *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct.

1731, 14 L.Ed.2d 601 (1965), are not necessarily appropriate when determining retroactivity of the double jeopardy clause. 409 U.S. at 508, 93 S.Ct. at 877. The Court, however, without setting forth an explicit analysis of retroactivity in the double jeopardy context, then proceeded to consider, at least to some degree, the *Linkletter* element of reliance by the state on procedures newly found to be constitutionally defective.[1] The Court stated:

> The element of reliance embodied in the *Linkletter* analysis will not be wholy absent in the case of constitutional decisions not related to trial procedure. . . .

409 U.S. at 509, 93 S.Ct. at 878.

The Court evaluated reliance by the State of Florida on previous, and now, unconstitutional lower court rulings prior to *Waller*, finding that reliance by the state

---

1. The State misinterprets the degree to which reliance was considered in *Robinson v. Neil*, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973). As we explained in *Bullard v. Estelle*, ____F.2d____ *(5th Cir. 1981)* [No. 80-2187, slip op. at ____]. *Robinson* did not call for an increased emphasis on "good faith reliance" by the State on an unconstitutional rule. While the Court, in *Robinson*, noted reliance in its statement that "[t]he element of reliance embodied in the *Linkletter* analysis will not be wholly absent in the case of constitutional decisions not related to trial procedure," 409 U.S. at 509, 93 S.Ct. at 878 (emphasis added), it did not indicate an increased emphasis on the reliance prong of *Linkletter*. Further, assuming that reliance on an unconstitutional rule is to be considered at all after *Robinson* when determining retroactivity, the Court has stated that reliance will be considered only when the purpose of the rule does not clearly favor retroactivity or prospectivity. *Brown v. Louisiana*, 447 U.S. 323, 328, 100 S.Ct. 2214, 2220, 65 L.Ed.2d 159 (1979).

We once again explain to the State that *Robinson*, as an explicit ruling on the retroactivity of a double jeopardy principle, and recent cases such as *Brown* that set forth an emphasis on reliance only in narrow circumstances in a procedural ruling, do not support the State's position that we should emphasize reliance above other considerations.

> on lower court decisions ... was a good deal more dubious than the justification for reliance that has been given weight in our *Linkletter line of cases. We intimate no view as to what weight should be accorded to reliance ... in determining retroactivity of a nonprocedural constitutional decision such as Waller.*

409 U.S. at 510-11, 93 S.Ct. at 878-79.

Robinson then, while indicating that double jeopardy rulings are not susceptible to the *Linkletter* analysis, 409 U.S. at 508, 93 S.Ct. at 877, continued to consider, to at least some degree, justifiability of reliance, finding the state's reliance unjustified.

After *Robinson,* the Court further amplified the element of reliance, stating:

> [W]e will give controlling significance to the measure of reliance and the impact on the administration of justice only when the purpose of the rule in question [does] not clearly favor either retroactivity or prospectivity. *Brown v. Louisiana,* 447 U.S. 323, 328, 100 S.Ct. 2214, 220, 65 L.Ed.2d 159 (1979) (citations omitted).

With the method used by the Court in *Robinson and its latest analysis of reliance in Brown, we now examine the specific ruling in Crist* to determine if it should be applied retroactively, finding that *Crist* itself, when read in the light of *Robinson* and *Brown,* answers our question clearly and succinctly:

> We agree with the Court of Appeals that the time when jeopardy attaches in a jury trial '*serves as the lynchpen for all double jeopardy jurisprudence*'... Today we explicitly hold what [*Illinois v.*] *Somerville* [410 U.S., 903 S.Ct.

> 1066, 35 L.Ed.2d 425 (1973)] assumed: The federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy.

437 U.S. at 36, 98 S.Ct. at 2161 (emphasis added).

> [T]he federal rule as to when jeopardy attaches in a jury trial is not only a settled part of federal constitutional law. It is a rule that both reflects and protects the defendant's interest in retaining a chosen jury. We *cannot hold that this rule, so grounded, is only at the periphery of double jeopardy concerns.*

437 U.S. at 37-38, 98 S.Ct. at 2161-62 (emphasis added). We further note the Court's conclusion that this principle should have been obvious before the *Crist* decision:

> Although it has thus long been established that jeopardy may attach in a criminal trial that ends inconclusively, the precise point at which jeopardy does attach in a jury trial might have been open to argument before this Court's decision in *Downum v. United States,* 372 U.S. 734 [83 S.Ct. 1033, 10 L.Ed.2d 100] [1963]. There the Court held that the Double Jeopardy Clause prevented a second prosecution of a defendant whose first trial had ended just after the jury had been sworn and before any testimony had been taken. The Court thus necessarily pinpointed the stage in a jury trial when jeopardy attaches, and the *Downum* case has since been understood as explicit authority for the proposition that a jeopardy attaches when the jury is empaneled and sworn. See *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 569 [97

> S.Ct. 1349, 1353, 51 L.Ed.2d 642]; *Serfass v. United States,* 420 U.S., [377] at 388 [95 S.Ct. 1055 at 1062, 43 L.Ed.2d 265].

437 U.S. at 38, 98 S.Ct. at 2162 (emphasis added).

Thus *Crist* establishes that (1) the time of attachment is critical in double jeopardy jurisprudence, (2) the time of attachment protects the defendant's substantial interest in a chosen jury,[2] and (3) the State should have been aware of this double jeopardy principle for several years prior to Burleson's indictment.

---

2. The State alleges that the error by the State when Burleson was indicted, the jury sworn, the indictment dismissed and a second trial held under a second indictment was a procedural rather than a sustantive error. We find this argument frivolous. In both *Crist* and *Robinson* the substantial nature of the double jeopardy right was clearly articulated and the integral nature of the time of attachment of that right, i.e., when the jury is sworn, was unquestionably established. For the State to claim that its action which placed Burleson in double jeopardy was a mere procedural error flies in the face of our double jeopardy jurisprudence.

The State also claims that the federal rule has little, if any, historical significance, citing the dissenting opinion of Justice Powell in *Crist, supra* 437 U.S. at 40-47, 98 S.Ct. at 2163-2166. We refer the State to Justice Stewart's majority opinion, *supra* at 36 and n.12, 98 S.Ct. at 2161 and n.12, for a discussion of the historic origins of the rule held retroactive here today. We will not engage in an irrelevant discussion of whether there is any historical precedent for the rule because

> [r]egardless of its historic origin, however, the defendant's "valued right to have his trial completed by a particular tribunal" is now within the protection of the constitutional guarantee against double jeopardy, since it is that "right" that lies at the foundation of the federal rule that jeopardy attaches when the jury is empaneled and sworn. *United States v. Martin Linen Supply Co., supra; Serfass v. United States, supra,* at 388, 95 S.Ct. at L062; *Illinois v. Somerville,* 410 U.S., at 467, 93 S.Ct. at 1072; *United States v. Jorn,* 400 U.S. 470, 478-480, 484-485, 91 S.Ct. 547, 553-54, 556-57, 27 L.Ed.2d 543 (plurality opinion).

From our analysis of *Crist*, inlight of *Robinson* and *Brown*, we find that the purpose of the attachment of jeopardy rule, to protect the defendant's interest in a chosen jury, militates strongly toward retroactivity. Thus, any other considerations such as reliance are, after *Brown*, questionable. To the extent that reliance is a consideration, we find, using the same method utilized by the Court in *Robinson*, that the State's claim is unpersuasive. The State claims that it relied in good faith on the pre-*Crist* law as to when jeopardy attaches in dismissing the original indictment and then retrying Burleson because, at the time of Burleson's conviction, jeopardy did not attach, as the Texas courts construed the double jeopardy clause, until the defendant had pled before the jury. *Lockridge v. State*, 522 S.W.2d 526 (Tex.Cr.App. 1975). We recognize that prior to the decision of the Texas Court of Criminal Appeals in *Ex Parte Myers*, 618 S.W.2d 365 (Tex.Cr.App. 1981), to the effect that *Crist* applied retroactively to overrule *Lockridge*, *Lockridge* was the law in Texas. We find, however, that according to *Crist*, the State should have been forwarned that the rule that jeopardy attaches when the jury was sworn was applicable to Burleson's case. 437 U.S. at 38, 98 S.Ct. at 2162. In 1963, the Supreme Court determined, in *Downum v. United States*, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963), that jeopardy attached in federal proceedings when the jury was sworn. In 1969 the double jeopardy clause was, for the first time, made applicable to the states through the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). As the State itself admits, "those federal holdings of constitutional magnitude" were, after *Benton*, clearly applicable to the states, and as the Court itself has clearly set forth in *Crist*, its holding of the time of attachment of jeopardy is of constitutional magnitude. 437 U.S. at 35-38, 98 S.Ct. at 2160-62.

Thus after *Downum* in 1963 and *Benton* in 1969, any

reliance claim by the State is speculative and, in the face of the important constitutional right to be protected, unjustified.[3]

Finally, the State claims that it would be unfairly prejudiced by retroactive application of Crist because it would be unable to prosecute Burleson for his theft crime. The State claims that Burleson, and alleged habitual offender, would "unfairly" go free.[4] While we recognize that Burleson will not be prosecuted for this crime, we find that the question we must ask is whether Burleson can be denied his substantial right to be free from being placed twice in jeopardy for the same offense. We find he cannot.

AFFIRMED.

---

3. The State urges us to find persuasive *Jackson v. Justices of the Superior Court of Massachusetts*, 549 F.2d 215 (1st Cir.) *cert. denied*, 430 U.S. 975, 97 S.Ct. 1666, 52 L.Ed.2d 370 (1977), and *United States v. Rumpf*, 576 F.2d 818 (10th Cir.) *cert. denied*, 439 U.S. 893, 99 S.Ct. 251, 58 L.Ed.2d 239 (1978), which held certain double jeopardy decisions nonretroactive. Neither of these cases dealt with the *Crist* type of double jeopardy decision. To the contrary, we find the two decisions where *Crist* was determined to be retroactive to be more closely on point. *Mizell v. Attorney General of New York*, 586 F.2d 942 (2nd Cir. 1978); *Ex Parte Myers*, 618 S.W.2d 365 (Tex.Cr.App. 1981). As the Court of Appeals for the Second Circuit stated in *Mizell:*

> It is evident that the Supreme Court in *Crist* considered that the rule which was formulated by *Downum* in 1963 was made applicable to the states by *Benton* in 1969 and was not simply a mechanical or arbitrary rule of convenience.

586 F.2d at 946.

4. The State additionally argues several hypothetical circumstances that could have occurred in Burleson's case. For example, it argues that if the prosecutor had dismissed the indictment a few minutes earlier without the jury having been impaneled, there would have been no double jeopardy problem. The State claims

(footnote continued on following page)

(footnote continued from previous page)

then that this "matter of moments" is insignificant. This argument ignores the Supreme Court's determination in *Crist* that the swearing of the jury is a significant moment with historical underprinnings in double jeopardy law. 437 U.S. at 36 and n.12, 98 S.Ct. at 2161 and n.12.

Opposition

ORIGINAL

NO. 81-1692

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1981

RECEIVED
JUN - 1 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

W. J. ESTELLE, JR.,

Petitioner

v.

WALTER VON BURLESON,

Respondent

On Petition for Writ of Certiorari

To the United States Court of Appeals

For the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT G. CLARK

Attorney for Respondent

714 Alexander Building
104 Pine St.
Abilene, Texas 79601
915/673-7193
SBN: 04297800

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	i
INDEX OF AUTHORITIES	ii
SUMMARY OF THE ARGUMENT	1
REASONS WHY THE WRIT SHOULD BE DENIED	2
CONCLUSION	6
CERTIFICATE OF SERVICE	7

IN THE SUPREME COURT OF THE UNITED STATES

W.J. ESTELLE, JR.,

Petitioner

V.

WALTER VON BURLESON,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Walter Von Burleson, by and through his appointed attorney of record, Robert G. Clark, (on appeal only) asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari without prepayment and to proceed in forma pauperis.

Robert G. Clark

ROBERT G. CLARK
Attorney for Respondent

INDEX OF AUTHORITIES

Cases	Page
Benton v. Maryland, 395 U.S. 784 89 S.Ct. 2056 (1969)	3
Brown v. Louisiana, 447 U.S. 323, 100 S.Ct. 2214 (1979)	6
Crist v. Bretz, 437 U.S. 1, 98 S.Ct. 2156 (1978)	passim
Downum v. United States, 372 U.S. 734, 83 S.Ct. 1833 (1963)	3,4
Ex Parte Myers, 618 S.W.2d 365, (Tex. Crim. App. 1981)	5
Illinois v. Sommerville, 410 U.S. 458, 93 S.Ct. 1066 (1973)	4,6
Jackson v. Justices of the Superior Court of Massachusetts, 549 F.2d 215 (1st Cir.), cert. denied, 430 U.S. 975, 97 S.Ct. 1667 (1977)	5
Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1735 (1965)	2,3,4
McElwee v. State, 589 S.W.2d 455 (Tex. Crim. App. 1979)	4,5
Mizell v. Attorney General of New York, 586 F.2d 942 (2d Cir. 1978) cert. denied, 440 U.S. 967, 99 S.Ct. 1519 (1979)	4
Palko v. Connecticutt, 302 U.S. 319 (1937)	3
Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876 (1973)	passim
United States v. Jorn, 400 U.S. 470, 92 S.Ct. 547 (1971)	4
United States v. Rumpf, 576 F.2d 818, (10th Cir. 1976), cert. denied, 439 U.S. 893, 99 S.Ct. 251 (1978)	6
Von Burleson v. State, 505 S.W.2d 553 (Tex. Crim. App. 1974)	
Waller v. Florida, 397 U.S. 505, 93 S.Ct. 876 (1973)	4

No. 81-_____

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1981

W. J. ESTELLE, JR.,

Petitioner

V.

WALTER VON BURLESON,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Walter Von Burleson, Respondent herein, by and through his attorney, Robert G. Clark, and requests that the Court deny the petition for writ of certiorari, and as grounds therefor, would respectfully show the Court the following:

SUMMARY OF THE ARGUMENT

The State of Texas has agreed that Respondent is entitled to relief if Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156 (1978) is retroactive. Such a position is curious since the Texas Court of Criminal Appeals has already decided that the Crist decision is to be applied

retroactively in Ex Parte Myers, 618 S.W.2d 365 (Tex. Crim. App. 1981). There is no doubt that the Crist decision is the important case as regards the issue of double jeopardy and when jeopardy attaches. The State has expressed its opinion that should Crist be applied retroactively then Respondent should be allowed his freedom.

The case of Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 976 (1973), is the Supreme Court's decision involving the retroactivity of the Crist decision. This case is explicit in citing that the Fifth Amendment's prohibition against double jeopardy is to be given full retoactive effect. In addition, the case of Mizell v. Attorney General of New York, 586 F.2d 942 (2d Circuit), cert. denied, 440 U.S. 967, 99 S.Ct. 1519 (1979) allows this Court to see how the Circuit Court level addressed a similar issue. This decision held that Crist should be applied retroactively, as well.

The State's attempt to have this case looked at in terms of the three-pronged test enunciated in Linkletter v. Walker, 381 U.S. 618 (1965) should be disregarded as such a test has been previously discussed and disregarded as pertinent to the issue of double jeopardy in the Robinson case previously cited.

Nowhere is the issue of the State's good faith reliance on an existing rule been cited as a consideration in deciding the possible retroativity of constitutionally mandated decisions. The State appears to be relying on unnamed equitable principles in referring to such detrimental reliance.

This Court should apply the Crist decision retroactively and end the State's attempts at the illegal incarceration of Respondent.

REASONS WHY THE WRIT SHOULD BE DENIED

CRIST V. BRETZ, 437 U.S. 28, 98 S.Ct. 2156 (1978), is a decision of the U.S. Supreme Court which should be given retrospective effect.

In Crist, 437 U.S. at 38, the Supreme Court held that the "federal rules that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy."

The decision characterized the rule as more than a mere arbitrary exercise in linedrawing, but rather stated that the decision on such a rule "serves as the lynchpin for all double jeopardy jurisprudence." Id. at 37, 38.

The federal rule that jeopardy attaches as soon as the jury is sworn was established by Downum v. United States, 372 U.S. 734, 83 S.Ct. 1833 (1963). Subsequently, in Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056 (1969), the Supreme Court overruled the longstanding Palko v. Connecticutt, 302 U.S. 319 (1937) decision, and stated, in effect, that the double jeopardy clause was held to be so fundamental to our scheme of justice that the same consitutional standards were mandated for the state and federal governments. These two cases provided the State with enough notice concerning the Supreme Court's view of double jeopardy as to preclude the now heard cry of "surprise." The statement by the State that there was "no serious suggestion of the forthcoming Bretz rule" is wholly unsupported in light of the previously cited Supreme Court decisions in Downum and Benton. (See Petitioner's Brief at p.7)

The State, as well as the Magistrate, attempted to analyze the application of Crist in terms of the Supreme Court's decision in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1735 (1965). The Court need look no further than the previously cited Robinson v. Neil decision in gaining insight to the application of the Linkletter rationale. In this case the Court examined the effect of two convictions, one municipal and one state, arising out of the same facts and circumstances. Admittedly, these facts are not four-square with the facts of the case at bar, nevertheless the Court's treatment is worthy of examination.

> "The fifth amendment's guarantee that no person be twice put in jeopardy for the same offense was first held binding in Benton.
>
> The prohibition against being placed in double jeopardy is likewise not readily susceptible of analysis under the Linkletter line of cases. Although the Court has not handed down a fully reasoned opinion on the retroactivity of Benton v. Maryland, it has indicated that it is retroactive without examination of the Linkletter criteria.

> "The guarantee against double jeopardy is significantly different from procedural guarantees held in the Linkletter line of cases to have prospective effect only. While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial.
>
> We hold therefore, that our decision in Waller v. Florida, 397 U.S. 505, 93 S.Ct. 876 (1973), is to be accorded full retroactive effect." (Cites provided by author)

It can be seen that the effect of the Robinson decision is to distinguish from the procedural aspects to be analyzed in light of the Linkletter criteria, and the substantive aspects such as the concept of double jeopardy which do not lend themselves to Linkletter scrutiny.

Further, in Mizell v. Attorney General of New York, 586 F.2d 942 (2d Cir. 1978), cert. denied, 440 U.S. 967, 99 S.Ct. 1519 (1979), a Court of Appeals addressed the instant issue. Their decision was to give retroactice effect to the Crist decision and in so doing stated as follows:

> "In any event, we believe Crist should be applied retroactively. Crist makes clear that the rule that jeopardy attaches as soon as the jury is sworn in not simply an arbitrary exercise in line drawing but rather 'serves as thelynchpin for all double jeopardy jurisprudence' and is 'an integral part of the constitutional guarantee against double jeopardy. 98 S.Ct. at 2162.'"

It can be seen that ample federal authority exists to decide the case at bar. Perhaps, the most interesting and puzzling aspect of this case is that the State of Texas, itself, has previously rules through the Court of Criminal Appeals that Crist should be applied retroactively.

The history of such a decision begins with the State decision in McElwee v. State, 589 S.W.2d 455 (Tex.Crim.App. 1979) which reads in pertinent part:

> "Under the federal case law, a termination of the trial after jeopardy attaches can only be proper when required by 'manifest necessity' or the 'ends of public justice,' and jeopardy generally attaches when the jury is selected and sworn. Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066 (1973); U.S. v. Jorn, 400 U.S. 486, 91 S.Ct. 547, (1971); Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033 (1963)."

During this case, the Court did not decide the issue of Crist's retroactivity, because the case involved a person who initiated his appeal and prosecuted same during the time Crist was decided.

> "Therefore, no determination need be made whether Crist is to be given retroactive determination under the guidelines set forth in Robinson v. Neil. We express no view on whether Crist is retroactive to those convictions which became final prior to the decision. This we reserve for another day."

However, the case which did determine the retroactivity of Crist appeared some two years later when the Court of Criminal Appeals decided the case of Ex Parte Myers, 618 S.W.2d 365 (Tex.Crim.App. 1981); decided some two months prior to the filing of the brief by the Petitioner at the District Court level and cited in the District Judge's order (See Order at Petitioner's Appendix B-3).

The Myers decision should prevail in this case and should have determined this case before the District Court ever became involved. Certainly had the decision in Myers been more forcefully brought to the attention of the Fifth Circuit, there is the possibility that the State's appeal would not have been allowed. The fact is that there is precedent at the state level for the retroactivity of Crist, the very issue that the State is now arguing before this Court.

Recalling the closing lines from the McElwee quote previously reproduced herein and continuing from Myers:

> "Today is the 'another day' reserved in McElwee v. State, 589 S.W.2d 455 (Tex. Crim. App. 1979) to express our view "whether Crist is retroactive to those convictions which became final prior to the decision.
>
> We hold that Crist is retroactive to those convictions which became final prior to the decision by the Supreme Court. We further find the circumstances that troubled the prosecuting attorneys in the case at bar do not amount to'manifest necessity' for a retrial."

It is clear from this case what Texas' approach is now. It is also clear judging from the already cited cases what the federal approach is to this type of case.

The State in its brief and petition further muddies what appear to clear waters with vague references to other Circuit decisions which do not apply the retroactive measure of Crist. In Jackson v. Justices of the Superior Court of Massachusetts, 549 F.2d 215 (1st Cir.), cert. denied, 430 U.S. 975, 97 S.Ct. 1667 (1977), the failure to apply the provision retroactively was based on the limited fact situation involving not prior criminal prosecutions but procedures involving a class of juveniles and the procedures surrounding initial juvenile

hearings and subsequent adult proceedings after certification. This fact situation is definitely distinguishable from our circumstances herein. In United States v. Rumpf, 576 F.2d 818 (10th Cir. 1976), cert. denied, 439 U.S. 893, 99 S.Ct. 251 (1978), that Court failed to allow retroactivity in a fact situation wherein there were multiple defendants and the facts involved the granting of a mistrial at the request of one of the defendants and thereafter proceeding on a retrial of all of the defendants. Nowhere in the Rumpf decision is cited even one of the cases which should be instrumental in determining the instant case. Rumpf clearly does not apply to the case at bar.

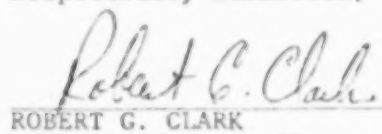
Although the State continues to rely upon the Robinson and Brown decisions in developing its reliance argument, the Court below addressed these cases, we believe, correctly. (See Court of Appeals opinion at States petition, Appendix C-5). The Court assesses the time when jeopardy attaches in a jury trial as serving "as the lynchpen for all double jeopardy jurisprudence... 'Today we explicitly hold what [Illinois v.] Somerville [cite omitted]assumed: The federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy.'"

Assuming this rule is not at the periphery of the double jeopardy concerns, the State's reliance argument can be afforded little weight, whatsoever.

CONCUSION

For the foregoing reasons, the judgment of the Circuit and District Courts should be affirmed and the State's Petition for Writ of Certiorari denied.

Respectfully submitted,



ROBERT G. CLARK
Attorney for Appellee

714 Alexander Building
104 Pine St.
Abilene, Texas 79601
915/673-7193
SBN: 04297800

CERTIFICATE OF SERVICE

Robert G. Clark certifies that pursuant to Rule 28 he served the preceding Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit and the accompanying Motion for Leave to Proceed in Forma Pauperis on counsel for Petitioner by enclosing a copy of same in an envelope, first-class postage prepaid and addressed to :

The Honorable Mark White
Attorney General of Texas
P. O. Box 12548
Capitol Station
Austin, Texas 78711

and depositing the envelope in the United States Post Office at Abilene, Texas, 79601 on May 27, 1982, and further certifies that all parties required to be served have been so served.

Robert G. Clark

Robert G. Clark

Attorney for Respondent